

Service Date: February 7, 1994

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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IN THE MATTER Of the Application)	TRANSPORTATION DIVISION
of Schlegel & Sons Contractors,)	
Inc., to amend their Montana)	DOCKET NO. T-93.41.PCN
Intrastate Certificate of Public)	
Convenience and Necessity.)	ORDER NO. 6247b

ORDER DENYING MOTION FOR RECONSIDERATION

BACKGROUND

1. On December 23, 1993 the Montana Public Service Commission (Commission) issued Final Order No. 6247a granting the Application of Schlegel & Sons Contractors, Inc., Kalispell, Montana for the following authority:

Class B - Heavy machinery and contractor's equipment between points and places within a radius of 150 miles of Kalispell, Montana, over all highways and roads within such radius.

The Commission, in granting this authority, adopted the proposed findings of fact, conclusions of law and decision of the hearing examiner, Commissioner Bob Rowe, issued as Order No. 6247 on November 2, 1993. In the final order, the Commission addressed Protestants' exceptions to the proposed order as a result of discussion in a publicly noticed work session.

2. On January 4, 1994 Protestants James A. Slack, Inc., Dick Irvin, Inc., and Monty Petersen, dba Petersen Trucking jointly filed their Motion for Reconsideration. The Commission acted to deny the Motion for Reconsideration at its work session held on January 10, 1994, by a vote of three to two.

FINDINGS OF FACT

3. The Commission finds that Protestants have not provided a factual basis or legal argument that the Commission had not previously considered in its discussion on Protestants' exceptions to the proposed order which resulted in adoption of the Final Order.

4. The Commission finds that Protestants' arguments are based on the premise that Applicant's former illegal operations render it unfit, thereby barring Applicant from obtaining the requested authority. This issue was thoroughly addressed in the Final Order. The Commission followed the traditional balancing of the severity of the illegal conduct with the public interest in the proposed service. Final Order No. 6247a, §§ 50-57. After determining that Applicant's operations were not an insuperable bar under the facts and circumstances of this case, the Commission put Applicant on notice that future violations would subject

Applicant to full enforcement of the law.

5. The Commission finds that Final Order No. 6247a followed long-standing analysis in granting the requested authority.

The Commission has customary misgivings when granting authority to an Applicant that has conducted illegal operations. However, the Commission generally defers to the hearing examiner and the Commissioner for the District to determine the credibility of the witnesses and the need for the proposed service in the District, when weighing the illegal conduct against the need for the service. Therefore, the Commission finds that the Motion for Reconsideration should be denied.

CONCLUSIONS OF LAW

6. The Montana Public Service Commission properly exercises jurisdiction over the parties and matters in this proceeding pursuant to Title 69, Chapter 12, Montana Code Annotated.

7. The Commission concludes, as a matter of law, that the original decision was just and warranted, and should not be changed upon reconsideration, pursuant to ARM 38.2.4806.

ORDER

WHEREFORE THE COMMISSION DENIES THE MOTION FOR RECONSIDERA-

TION.

Done and Dated this Eighteenth day of January, 1994 by a
vote of 3-2.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

BOB ANDERSON, Chairman

BOB ROWE, Vice Chairman

DAVE FISHER, Commissioner
(Voting to Dissent)

NANCY MCCAFFREE, Commissioner

DANNY OBERG, Commissioner
(Voting to Dissent/Attached)

ATTEST:

Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: You may be entitled to judicial review in this matter.
Judicial review may be obtained by filing a petition
for review within thirty (30) days of the service of
this order. Section 2-4-702. MCA

DISSENT

I would have granted the motion for reconsideration and denied the Class B Certificate of Authority.

I have read the transcript, reviewed the record and determined that the majority analysis failed in several areas.

In the first instance it appears to me that the carrier has blatantly and knowingly disregarded motor carrier law and violated the terms of his Class B certificate for long periods of time.

Within six months of receiving his Class C authority he became aware that his was making movements far beyond the scope of his authority. At that time he failed to contact either the PSC or an attorney on how he could remedy his situation. By his account he rather relied on what someone told him and tried to use Bill of Sales to skirt regulation. For some 14 more months he operated illegally until a visit from a PSC field officer forced him to consult an attorney and file a case. He still made illegal hauls until after the case was protested.

Mr. Schlegel had a responsibility to become familiar with the rules and regulations from the day he obtained his certificate. Even if they were good faith violations at first they rapidly assumed bad faith hauls when he failed to take the affirmative steps needed to haul within the scope of his authority. As every 4th grader who studies the file of Abraham Lincoln knows "ignorance of the law is no excuse". In this hearing a late filed exhibit detailed 150 or more hauls that were clearly illegal. Mr. Schlegel has not proved himself a fit carrier and the application should have been rejected on those grounds.

A thorough review of the transcript indicates to me that Mr. Schlegel at least did a good job when he broke Montana Statutes concerning Class C carriers. Two dozen witnesses spoke in favor of the applicant and often in glowing terms. My analysis of the record shows that even so the testimony would have been insufficient to grant the authority for lack of a proof of need. The large number of witnesses can be narrowed down by the fact most were really testifying as to preference rather than unmet need. Others would still be provided service under Mr. Schlegel's Class C permit. Most witnesses indicated the services of other carriers was satisfactory.

The protestants indicated they had the capability to provide the services being requested. Mr. Slack had suffered considerable financial harm and testified to a loss of 80,000 dollars income.

Protestant Irvin indicated that the illegal moves hid the amount of the read need and he was ready and willing to relocate equipment to meet the need. There was an adverse impact on existing carriers proven and the authority should have been denied.

On the basis of fitness, lack of need other than preference, and adverse impacts to existing carriers the request for Class B authority should have been denied. Therefore, I dissent from the majority.

Danny Oberg
Commissioner